Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

LARRY S. SMITH, AND ALL SYRUPS, INC.,
Petitioners,
vs.
MULTI-FLOW DISPENSERS OF OHIO, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a properly defined submarket for puposes of a monopolization claim under Section 2 of the Sherman Anti-Trust Act (15 U.S.C. § 2) must include alleged potential competitors and their contract customers without proper factual inquiry as to whether the product offered by such alleged potential competitors is reasonably interchangeable with the product offered by the parties to the litigation.

2. Whether a properly defined submarket for puposes of a monopolization claim under Section 2 of the Sherman Anti-Trust Act (15 U.S.C. § 2) must include alleged potential competitors without any factual inquiry as to the cross-elasticity of demand for the product offered by such alleged potential competitors *vis a vis* the product offered by the parties to the litigation.

3. Whether a properly defined submarket for puposes of a monopolization claim under Section 2 of the Sherman Anti-Trust Act (15 U.S.C. § 2) must include alleged potential competitors without any factual inquiry as to whether any of the seven practical indicia of the existence of a submarket as set forth in *Brown Shoe* exist.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as noted in the case caption. The Petitioner All Syrups, Inc. is a now defunct Ohio corporation and has no parent or subsidiary companies.

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I. This Case Presents Important Questions as to When and Under What Circumstances an Antitrust Complaint May be Dismissed Pursuant to Civil Rule 12(b)(6), for failure to define a viable product submarket, in light of *Brown Shoe* and its progeny.

II. This Case Offers This Court the Opportunity to Revisit the Tests of Reasonable Interchangeability of Use and Cross-Elasticity of Demand as Set Forth in *Brown Shoe* and in other Supreme Court Decisions, and to Examine the Seven "Practical Indicia" of the Existence of a Submarket, as Set Forth in *Brown Shoe*.

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Petitioners Larry S. Smith and All Syrups, Inc. respectfully request that a writ of certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is attached hereto as Apdx. A. The Opinion of the District Court granting dismissal of Petitioners' Amended Complaint is unreported and is attached hereto as Apdx. C. In addition, the Opinion of the District Court denying in part summary judgment based upon Petitioners' original Complaint is unreported and is attached hereto as Apdx. B.

JURISDICTION

The judgment of the Court of Appeals (Apdx. A) was entered on May 14, 1999. This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Anti-Trust Act (15 U.S.C. § 2) states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

> States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This is an appeal from an order of the Sixth Circuit Court of Appeals affirming that of the United States District Court for the Northern District of Ohio, Eastern Division, dismissing the Amended Complaint of Appellants, Larry S. Smith and All Syrups, Inc. ("Petitioners") for failure to state a claim pursuant to Civil Rule 12(b)(6); in that the Amended Complaint purportedly fails to define a cognizable product market or submarket under Section 2 of the Sherman Anti-Trust Act (15 U.S.C. § 2).

In particular, the district court held, and the Sixth Circuit agreed, as a matter of law, that, while a relevant product submarket for antitrust purposes may be limited to a segment of customers, such a limitation must be based on a distinction in the *product* (presumably, the actual physical product) sold to those customers. Making the factual determination that no distinction exists between the combination of products and services offered by the parties (who are local companies engaged generally in the beverage distribution business) and those offered by alleged potential competitors such as Coca-

Cola and PepsiCo, both courts held that Petitioners' product market definition was deficient in that it excluded nationally owned restaurants, even though the evidence already in the record demonstrated that within the greater Cleveland, Ohio geographic market defined in the Amended Complaint, locally owned restaurants are under contract almost exclusively with Multi-Flow.

Multi-Flow, located in Cuyahoga Heights, Ohio, sells, leases and services beverage dispensing equipment; a variety of flavored beverage syrups, including national brand soft drink syrups such as Coca-Cola and Pepsi-Cola; its own brand carbonated syrups; and non-carbonated drink mixes, such as flavored teas, lemonade, juices, and non-alcoholic bar mixes in the metropolitan Cleveland, Ohio area.

In January, 1990, Petitioner Larry S. Smith ("Smith"), a former independent sales representative for Multi-Flow, formed Petitioner All-Syrups, Inc. ("All-Syrups"), to compete with Multi-Flow. Both Multi-Flow and All-Syrups provided a full line of services to their customers; whereas national distributors such as Coca-Cola and PepsiCo provide little other than "door drop" delivery to their customers. *Prior to the formation of All-Syrups, besides a small Coca-Cola distributor purchased by Multi-Flow during the course of the litigation, Multi-Flow was the only other independent fountain beverage distributor within the greater Cleveland area.*

By October of 1990, Multi-Flow was engaging in a variety of anti-competitive practices calculated to drive All-

Syrups out of business, including predatory pricing, "confiscation" (sometimes with the aid of an off duty Cuyahoga Heights police detective acting out of his jurisdiction) of All-Syrups' equipment from customers; intimidation and threats to Mr. Smith; and the purchase of Coca-Cola distribution rights from All-Syrups' supplier in order to prevent All Syrups from obtaining Coca-Cola products.

Petitioners brought the present suit against Multi-Flow in 1993, alleging monopolization under the Sherman Act and asserting various state law claims. Multi-Flow filed an answer and counterclaim and, after some initial discovery, moved for summary judgment on the ground, among others, that the Complaint failed to settle on a single relevant product market.

Petitioners responded that the Complaint -- when read as a whole -- relied on only one relevant product market, the market for "supplying flavored beverage syrups, as well as mixers and other products, together with delivery systems and services to restaurants and taverns" in the Cleveland metropolitan area.

In ruling on the summary judgment motion, the district court concluded that issues of fact precluded grant of summary judgment for Multi-Flow, noting Petitioners' evidence that the national distributors do not compete with Multi-Flow "because of the peculiar uses for which soft drinks are often used in this market, the distinct customer market, the different price expectations of [Multi-Flow's] customers and the specialized nature of the distribution business involved. . . ." (Apdx B 10).

Other evidence acknowledged by the district court includes price and quality considerations, certain competitive advantages (such as an open shop) enjoyed by Multi-Flow over the national brands, and the fact that Multi-Flow does not, in fact, face any competition from Coke, Pepsi and 7-Up, whose products Multi-Flow distributes to taverns and locally owned restaurants.

After denial of summary judgment, Petitioners requested leave to file an amended complaint in order to remove any doubt that the only product market identified by Plaintiffs has been that for supplying beverage dispensing systems, service and flavored syrups to taverns and restaurants in the Cleveland metropolitan area. The Amended Complaint, however, provides a more limited definition of the relevant market than is apparent on the face of the original Complaint, defining the relevant market in terms of supplying beverage dispensing equipment and related services, and flavored syrups, mainly to taverns and *locally owned restaurants* . . . in the Cleveland metropolitan area." (Emphasis added). Multi-Flow responded to the Amended Complaint by moving to dismiss it, arguing that the new definition of the relevant market excluded substantial numbers of potential customers -- specifically, non-locally owned restaurants -- without a basis for doing so.

After responding to the motion to dismiss, Petitioners sought additional discovery. Multi-Flow moved for a stay of discovery pending resolution of the motion to dismiss, arguing that discovery was not needed to resolve the issues of law. The district court granted Multi-Flow's request and stayed

discovery.

During a subsequent status conference, the district court indicated that it was inclined to grant the pending motion to dismiss; the Petitioners, however, were invited to file a supplemental memorandum in opposition to the dismissal motion, in which they asserted, among other things, that evidence already before the district court (specifically including Multi-Flow's distributorship agreement with Coca-Cola, which grants Multi-Flow the right to distribute Coke products to customers with a liquor license and four or less locations, the Affidavit and Supplemental Affidavit of Smith, and the Lindeman Affidavit) demonstrated at least a genuine issue as to the existence of the separate submarket.[1]

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[1] Multi-Flow's contracts with Coca-Cola and PepsiCo demonstrated that Multi-Flow's customers included only taverns and locally owned restaurants, but not national chain restaurants. The agreement with Coca-Cola permitted Multi-Flow to distribute Coke products to "retail outlets that hold a valid liquor, beer or wine license and derive a substantial percentage of their revenue from the sale of alcoholic beverages, including such outlets as bars, taverns, and contemporary theme and upscale restaurants, *but that are not part of a chain of five or more units.*" (Emphasis added). Multi-Flow's agreement with PepsiCo's local distributor, General Cinema Beverages of Ohio, Inc. provided that Multi-Flow would distribute Pepsi products to customers, chosen at Pepsi's discretion, "*currently*

The district court granted the motion to dismiss, concluding that Petitioners had no basis for alleging that the "product" offered to taverns and "locally owned" restaurants differed from the product used by non-locally owned restaurants. In other words, despite acknowledged evidence in the record of significant differences between the services offered by the parties and those offered by the national brands, and evidence that the national brands do not compete in the market; the district court rejected the corollary assertion that their customers should not be considered *potential customers*. Apparently recognizing this fact, the district court stated in its opinion granting dismissal, "[t]o the extent that this Opinion is inconsistent with this Court's August 18, 1995 Opinion, Docket No. 96, that Opinion is hereby modified. . . ."

The Sixth Circuit Court of Appeals affirmed the decision of the district court, concluding as a matter of law that Petitioners failed to justify their definition of the relevant market as set forth in the Amended Complaint. Like the district court in ruling on the motion to dismiss, the court of appeals refused to examine the evidence in the record demonstrating Multi-Flow's market power in the tavern/local restaurant market. Multi-Flow's customer list produced in discovery showed that Multi-Flow was under contract with the vast majority of locally owned restaurant within the geographic market. Comparison of

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purchasing less than three hundred gallons of postmix syrup per year. . . ." (Emphasis added).

Multi-Flow's customer list with the then current list of liquor license holders covering roughly the same area (obtained from the Ohio Department of Liquor Control) showed that slightly more than 42% of all such license holders (2,750 customers divided by 6,500 license holders) were Multi-Flow customers. This percentage was probably much higher, as the list of liquor permit holders includes a large numer of businesses outside of the relevant geographic market, liquor, beer and wine manufacturers, distributors, and transportation companies which were clearly not customers nor potential customers.

In addition, both courts ignored the market power occasioned by Multi-Flow's five year lease agreements with its customers, tied to the purchase of syrups only from Multi-Flow, which presented any potential competitor with a formidable barrier to entry; and other relevant evidence of Multi-Flow's power to raise prices or control competition, beginning with the fact that Multi-Flow is the only business of its type in the relevant geographic market, and the fact that entities related to Multi-Flow may exercise appreciable economic power in the adjacent markets of Toledo and Youngstown.

Both courts also ignored Petitioners' assertion that Multi-Flow's open shop gave it a competitive edge over the national distributors in servicing customers who expect more than "door drop" delivery of product; and further ignored Petitioners' assertion that a PepsiCo funded study conducted by Multi-Flow's expert, David Kaplan, refers in its pages to the "fountain channel" of distribution, and states in reference to this

"fountain channel" that "*[c]ertain national accounts, such as McDonald's, are sold directly by PepsiCo or Coca-Cola*, with individual locations serviced by local bottlers or distributors. . . ." Tollison, Kaplan & Higgins, Competition and Concentration, the Economics of the Carbonated Soft Drink Industry 42, n. 29 (1994) (emphasis added).

Nor did the court of appeals draw any inferences in Petitioners' favor from the evidence it did examine. Rather than viewing Multi-Flow's distribution contracts with the national distributors as inferring industry recognition that liquor license holders and locally owned restaurants form a distinct submarket, or as inferring that the national distributors might be unable effectively to compete in that submarket, the court of appeals instead found that even though national concerns may "prefer" larger customers, this says nothing about whether the products offered by the national distributors are reasonably interchangeable with products sold by local providers (Apdx. A - 9).

The court of appeals opined that Multi-Flow's contracts with the national distributors to sell their syrups to Multi-Flow's small, locally owned accounts only served to show that such products *are* "identical and interchangeable. . ." with Multi-Flow's. (Apdx. A - 10). As further evidence of "interchangeability," the court of Appeals determined that Multi-Flow's distribution contracts showed that "the national brand distributors consider Multi-Flow a potential competitor for their *larger* customers." (Apdx. A - 10) (emphasis added). Whether Multi-Flow presented a threat to the national brands for their

larger customers is an interesting question; but has nothing to do with the relevant inquiry of whether or not the national distributors presented any potential competition to Multi-Flow for its smaller customers.

The court of appeals also rejected any "total service" distinction as a possible reason for excluding non-locally owned customers from the product market. While, as the court of appeals noted, the Amended Complaint makes no *allegation* that non-locally owned restaurants *could not use* all of the services provided by Multi-Flow (Apdx. A - 10-11), the evidence showed that non-locally owned restaurants *did not in fact* use all of the services provided by Multi-Flow (and All-Syrups); but instead apparently opted to pay national distributors a *higher price* for *less service* in the form of "door drop" only delivery.[2] *Far from being an attempt to define a product market in terms of Multi-Flow's customers, as the court of appeals found (Apdx. A - 11), drawing a distinction between full service and door drop delivery was merely another way of describing the market reality demonstrated by the evidence, albeit gleaned from limited initial discovery. In fact, the*

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[2] In this regard, it must again be remembered that Petitioners presented evidence that Multi-Flow was the only independent fountain beverage distributor in the geographic market, and that virtually all of its restaurant customers were locally owned (meaning very few of its restaurant customers were non-locally owned).

product market well could have been defined as "full service fountain beverage distribution," rather than in terms of the customers who contract for such services. In either case, the prevailing market reality was that national distibutors sell very little full service, and non-locally owned restaurants purchase very little full service.

In short, while the court of appeals was "persuaded by the handful of cases" that have held that an antitrust plaintiff may not narrow a relevant product market to a select group of customers without identifying a difference in the *product* supplied to that group of customers, it refused to draw any inferences favorable to Petitioners respecting the proffered distinctions -- even where there was evidence already in the record to support those inferences -- and substituted its judgment for that of a jury without a proper analysis of reasonable interchangeability and without any inquiry as to cross-elasticity of demand, or the seven practical indicia of a submarket as set forth by this Court in Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions as to When and Under What Circumstances an Antitrust Complaint May be Dismissed Pursuant to Civil Rule 12(b)(6), for failure to define a viable product submarket, in light of *Brown Shoe* and its progeny.

Although many issues are presented here, the central issue is whether Petitioners' Amended Complaint states a claim pursuant to Civil Rule 12(b)(6). The district court and the court of appeals disposed of the Amended Complaint (and the balance of Petitioners' case) because the Amended Complaint -- perhaps only because it was inartfully drafted -- defines a product market for antitrust purposes in part with reference to a group of customers.

Pursuant to Federal Civil Rule 12(b)(6), a complaint fails to state a claim upon which relief can be granted only if "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The complaint is to be construed in the light most favorable to the plaintiff and all factual allegations are to be considered as true. Scheuer v. Rhodes, 416 U.S. 232 (1974).

There are no special pleading requirements in antitrust cases, and the allegations of an antitrust complaint need not be plead with any special degree of particularity. Three Crown Limited Partnership v. Caxton Corp., 817 F. Supp. 1033

(S.D.N.Y. 1993); New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435 (D. Mass. 1985). All that is required is a short, plain statement of the facts sufficient to place the defendant on notice of what is being alleged. Hohensee v. Akron Beacon Journal Publishing Co., 174 F. Supp. 450 (N.D. Ohio 1959), aff'd, 277 F.2d 359 (6th Cir. 1960), cert. denied, 364 U.S. 914 (1960); Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Services. 746 F. Supp. 320 (S.D.N.Y. 1990); Brandt Consolidated, Inc. v. Agrimar Corp., 801 F. Supp. 164 (C.D. Ill. 1992). Moreover, where, as here, "a *per se* violation is charged, with resulting harm to the plaintiff alleged, the pleading suffices. . . ." 2A J. Moore, Moore's Federal Practice, ¶ 8.17[4] (1996); see also, Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 660 (1961).

The Amended Complaint describes "the market for beverage dispensing systems, service and flavored syrups sold to taverns and locally owned restaurants. . ." within the six county geographic area surrounding Cleveland. The Amended Complaint, as well as the original Complaint, thus satisfy minimal procedural requirements in that they identify a product market sufficiently to place the defendant on notice of what is being alleged.

To the extent that the district court and the court of appeals found that the Amended Complaint does not *allege* facts to support limiting the relevant market to locally-owned establishments, the Civil Rules merely *permit* amendments to conform to the evidence, they do not *require* them. See

generally, 6A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1493 (1990); 2A J. Moore, Moore's Federal Practice, ¶ 8.14 at 75-76 (1996) ("Even without an amendment, however, a party is entitled to any relief justified by the evidence.") At the time the Amended Complaint was filed -- immediately following the denial of summary judgment -- there was already before the Trial Court a body of evidence in the form of affidavits, Multi-Flow's customer list, a properly authenticated list of liquor license holders within roughly the geographic market identified in the Amended Complaint, Multi-Flow's agreements with Coca-Cola, Pepsi and 7-Up, the Affidavit of Professor Ralph W. Lindemann, and the two Smith affidavits. These materials, at the very least, supported limiting the relevant market to taverns and locally owned restaurants, because they demonstrated that the vast majority of non-locally owned establishments dealt exclusively with the national distributors, while most local customers deal with their only alternative, Multi-Flow. Whether or not non-locally owned taverns and restaurants should have been considered actual or potential customers in the product market was a factual issue which was inappropriate for resolution on a motion to dismiss.

Dismissal of antitrust cases is meant for those rare occasions where the complaint itself is *facially deficient*, such as where the alleged offense (*e.g.*, "conspiracy to attempt to monopolize") does not exist, or the complaint itself admits or demonstrates facts (such as the running of the statute of limitations) which defeat the claim, or (as is often the case)

demonstrate that the plaintiff clearly lacks standing to sue. United States v. Dunham Concrete Products, 501 F.2d 50 (5th Cir. 1974) ("conspiracy to attempt to monopolize" not cognizable under the Sherman Act); Dry v. Methodist Medical Center of Oak Ridge, Inc., 893 F.2d 1334 (6th Cir. 1990) (dismissal of monopolization claim affirmed where pleadings *alleged* plaintiff competed in *different market* than defendant); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977) (complaint alleging injury from zoning board ruling sought by defendant demonstrated on its face defendant's immunity under *Noerr-Pennington* doctrine). Nothing on the face of the Amended Complaint reveals any such fatal defect, and its dismissal was therefore erroneous.

An antitrust complaint should not normally be disposed of based upon formalistic distinctions *even upon summary judgment*, let alone a motion to dismiss:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'

Eastman Kodak Company v. Image Technical Services, Inc., 112 S.Ct. 2072 at 2082 (1992) (citing Maple Flooring Mfrs. Ass'n. v. United States, 268 U.S. 563,579, 45 S.Ct. 578, 583,

69 L.Ed. 1093 (1925); United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 395, n.22, 76 S.Ct. 994, at 1007, n.22 (1956); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 70, 97 S.Ct. 2549, 2568, 53 L.Ed.2d 568 (1977)). As the Sixth Circuit has stated:

> It is not the province of the district Court on summary judgment to balance or ignore evidence submitted by either party, unless that evidence, as a matter of law is without basis.

Hand v. Central Transport, Inc., 779 F.2d 8, 11 (6th Cir. 1985).

Summary disposition of an antitrust complaint on the issue of product market is only appropriate in two circumstances, none of which exist here. First, summary judgment may be appropriate when the defendant establishes that the market it defines *describes actual market behavior* so accurately that the [non-movant's] assertion of market power . . . if not implausible; is at least unreasonable." Eastman Kodak, 112 S.Ct. at 2084; (emphasis added). Second, *in the absence of evidence of actual market behavior*, the movant may be entitled to summary judgment if the market *it* defines describes actual market behavior in terms of "immutable physical law" or "basic economic reality" so well settled as to *render* the plaintiff's theory "economically senseless." Eastman Kodak 112 St.Ct. 2084; Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660, 663 (6th Cir. 1993).

In Eastman Kodak, this Court refused to accept Kodak's

unsupported assertion that, as a matter of law, lack of power in original equipment markets *conclusively establishes* lack of power in aftermarkets. Id. at 2084. The Sixth Circuit followed Eastman Kodak in a similar case, refusing to apply a formalistic rule to dispose of the plaintiff's case where there was some evidence to support it, and none offered by the defendant. Virtual Maintenance, Inc. v. Prime Computer, Inc., 995 F.2d 1324, as amended, 11 F.3d 660 (6th Cir. 1993) Likewise, in Hand v. Central Transport, the Sixth Circuit criticized the trial court for taking it upon itself to define the relevant product market broadly after ignoring evidence of a submarket proffered by the plaintiff: "[a]t the very least, the proffered evidence of the submarket raises an issue of material fact not appropriate for summary adjudication. . ." Id. at 11; see also H. Hovenkamp, Federal Antitrust Policy (Hovenkamp), § 16.8 at 580-81 (1994) (summary disposition of antitrust complaints is inappropriate unless the defendant's theory is "so robust, or so well established within antitrust doctrine, that claims in contradiction would be regarded as fundamentally implausible.") In this case, the single decision cited by the district court for the proposition that limitation of a product market to a segment of customers must reflect a distinction in the product sold, was not only decided on a JNOV, rather than on a motion to dismiss or for summary judgment; but also *cites no other authority for the proposition.* See T. Harris Young & Associates, Inc. v. Marquette

Electronics, Inc., 931 F.2d 816, 824 (11th Cir. 1991).[3] While the Eleventh Circuit is by no means bad authority, the fact remains that the economic proposition it advances lacks the robustness required of such a rule under the later Eastman Kodak decision.

Indeed, the Eleventh Circuit in T. Harris Young had difficulty in attempting to explain cases involving product distinctions which are purely demand driven (i.e., different only in the eyes of consumers). The court thus asserted that "championship boxing" is distinct from all other forms of boxing because of its "salability." Id. at 825, n. 17. But "salability" merely describes demand from the supply side, and there are any number of cases where analysis has yielded a finding of a narrow product market based upon demand, where the products involved appear to be and are in fact generically the same. International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 79 S.Ct. 245 (1959) ("championship" boxing distinct from any other form of professional boxing); United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct.

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[3] Indeed, the Eleventh Circuit in T. Harris Young might have reached a different decision under the facts of this case, as it did not rule out the possibility of separate markets "[i]f, for example, a product is specially designed for a certain group of purchasers and the suppliers concentrate their efforts almost exclusively on those purchasers. . . ." T. Harris Young, 931 F.2d at 824.

1715 (1963) ("commercial banking" distinct from "banking"); United States v. Paramount Pictures, 334 U.S. 131, 172-73, 68 S.Ct. 915 (1948) ("first run" motion pictures distinct from "motion pictures"). Products which do not compete in the eyes of consumers should simply not be regarded as in the same market. Hovenkamp, § 3.3, p. 91. Petitioners submit that it was reversible error for the courts below to base their decisions upon the application of a formalistic rule which does not rise to the level of "basic economic realty."

The second ground for summary disposition of an antitrust complaint based on market definition -- where, in the absence of any evidence, the market *the defendant describes* reflects "actual market behavior" so accurately that the plaintiffs definition is implausible or unreasonable -- is also lacking here.

Multi-Flow defined the product market to include taverns and all restaurants in greater Cleveland, regardless of ownership, even though the evidence made it clear that non-locally owned restaurants prefer overwhelmingly (although not exclusively) to deal with national distributors, while locally owned restaurants prefer overwhelmingly (although not exclusively) to deal with the only local alternative, Multi-Flow. Given the evidence, Petitioners assert that Multi-Flow's market definition contrasted with, rather than reflected, economic reality. At the very least, Multi-Flow's market definition is no more plausible that Petitioners' and, therefore, even in the absence of any evidence, dismissal for failure to state a claim was entirely inappropriate. Eastman Kodak 112 St.Ct. 2084;

Virtual Maintenance, 11 F.3d at 663.

II. This Case Offers This Court the Opportunity to Revisit the Tests of Reasonable Interchangeability of Use and Cross-Elasticity of Demand as Set Forth in *Brown Shoe* and in other Supreme Court Decisions, and to Examine the Seven "Practical Indicia" of the Existence of a Submarket, as Set Forth in *Brown Shoe*.

The offense of monopolization has two elements under § 2 of the Sherman Act: (1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from its growth or development as a consequence of a superior product, business acumen or historic accident. Eastman Kodak, 112 S.Ct. at 2079. Monopoly power is defined as "the power to control prices or to exclude competitors." United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1956); White & White v. American Hospital Supply, Inc., 723 F.2d 495, 507 (6th Cir. 1983).

To determine whether the defendant possesses monopoly power, the relevant market must be defined. Spectrum Sports, Inc. v. McQuillan, 113 S.Ct. 884, 890 (1993); United States v. Grinnell Corp., 384 U.S. 563, 570 (1966). The relevant market is determined by the trier of fact. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82

S.Ct. 486, 491 (1962); du Pont, 351 U.S. at 381; White & White, 723 F.2d at 499-500. In White & White, the Sixth Circuit found that the existence of any product market is to be gauged by examining *both* the "interchangeability of other products for the same use, *and* by consumer sensitivity and response to price fluctuations among available substitutes." Id. at 501 (emphasis added). Hence, the relevant market is said to include products which are both reasonably interchangeable and have a high cross-elasticity of demand. du Pont, 351 U.S. at 381-95.

Reasonable interchangeability -- the only inquiry made by either of the courts below -- looks to the end uses and characteristics of a product. Id. at 377. Products and services that are not reasonably interchangeable have, on occasion, been included in a single market "where the combination reflects commercial realities." Grinnell, 384 U.S. at 572 (fire and burglary services included in same market, based in large part on demand for consolidated services). More often, however, products have been found to belong in separate markets even though, generically, they are "reasonably interchangeable" or even indistinguishable. International Boxing Club of New York v. United States, 358 U.S. 242 (1959) (*championship* boxing); Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association, 468 U.S. 85 (1984) (televised *college* football). Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 714 (7th Cir. 1979) (*drive-thru* photofinishing); United States v. Paramount Pictures, 334 U.S. 131, 172-73 (1948);

(*first run* feature films); Virtual Maintenance, 995 F.2d 1324, 1327 (6th Cir. 1993) (*"Ford compatible"* software); Tenneco, 98 F.T.C. 464, 580-81 (1981), rev'd on other grounds, 689 F.2d 346 (2d Cir. 1982) (*replacement* shock absorbers).

Cases such as International Boxing, NCAA, Photovest and Paramount exist because "[p]roducts that do not compete in the eyes of consumers should not be regarded as in the same market on the basis of demand analysis. . . ." Id., § 3.3 at 91. They also exist because two products should not be included within the same market merely because they perform the same function. Hovenkamp, § 3.3 at 90. Moreover, even complete interchangeability does not indicate a relevant market when there is a substantial difference in price or in the cost of delivering the product. See, e.g., Consolidated Gas Co. v. City Gas Co., 665 F. Supp. 1493, 1517 (S.D. Fla. 1987), aff'd, 880 F.2d 297 (11th Cir. 1989) (production costs); C.E. Services v. Control Data Corporation, 759 F.2d 1241, 1246-47 (5th Cir.), cert. denied, 474 U.S. 1037 (1985) (price); Tenneco, 98 F.T.C. 464, 580-81 (distribution costs).

Cross-elasticity of demand focuses on "the extent to which customers will change their consumption of one product in response to a price change in another. . . ." Eastman Kodak, 112 S.Ct. at 2083. Products are likely to be in the same market if a slight decrease in the price of one causes customers of similar products to switch to the lower priced product. du Pont, 351 U.S. at 400. Conversely, "products are generally held to be in different markets if their cross-elasticity of demand is low,

meaning that price changes in one product cause little or no change in demand for similar products. . . ." du Pont, 351 U.S. at 400. Despite the fact that cross-elasticity analysis would have shown a low cross-elasticity of demand between the services offered by the national distributors and those offered by local distributors within the geographic market, no cross-elasticity analysis was performed by the courts below.

Moreover, proper application of the seven practical indicia of the existence of a submarket would have likewise led to the conclusion that Petitioners' product submarket was appropriately defined for antitrust purposes. As this Court has stated:

> The *outer boundaries* of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, *within this broad market*, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962) (emphasis added).[4] There are seven "practical indicia" of the

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[4] Although Brown Shoe was brought under § 7 of the Clayton Antitrust Act, the Supreme Court has recognized that "[i]n § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act, there may be submarkets that are separate economic

existence of a submarket: (1) industry or public recognition of the submarket as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) distinct prices; (4) distinct customers; (5) sensitivity to price changes; (6) specialized vendors; and (7) unique production facilities.
Brown Shoe, 370 U.S. at 523; White & White, 723 F.2d at 501. The absence of one or more of the seven practical indicia does not preclude the finding of a submarket. Abex Corp. v. Federal Trade Commission, 420 F.2d 928 (6th Cir.), cert. denied, 400 U.S. 865 (1970) (distinct price, peculiar characteristics and uses, and separate production facilities sufficient to support finding of submarket).

Submarket analysis is not optional. Rather, "*as a matter of law, submarket analysis, if not a substitute for the standard market test, is a factor to be considered in defining the relevant market. . . .*" Hand v. Central Transport, 779 F.2d at 11 (emphasis added). Hence, the proper analysis entails "an articulation of the basic definitions of relevant geographic and product markets, *together with* identifying the additional submarket criteria." White & White, 723 F.2d at 500 (emphasis added).[5] The boundaries of the relevant submarket must, in

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entities." Grinnell, 384 U.S. at 572.

[5] Areeda notes that "most of the Brown Shoe indicia of submarkets relate[ ] to substitutability in supply or demand, just as the criteria for identifying markets themselves. . . .

turn, be drawn with sufficient breadth "to recognize competition where, in fact, competition exists. . . ." Brown Shoe, 370 U.S. at 326. The result of all of this, ideally, is a system where legal definitions of markets reflect commercial realities. Eastman Kodak, 112 S.Ct. at 2079.

Here, at least some of the practical indicia are present. *First, the soft drink industry considers local taverns and restaurants to be an economic entity separate from the non-local, regional or national chains.* In a PepsiCo funded study co-authored by Multi-Flow's own expert, David Kaplan, the authors discuss the "fountain channel" of distribution, and state in reference to this "fountain channel" that "*[c]ertain national accounts, such as McDonald's, are sold directly by PepsiCo or Coca-Cola*, with individual locations serviced by local bottlers or distributors. . . ." Tollison, Kaplan & Higgins, Competition and Concentration, the Economics of the Carbonated Soft Drink Industry at 42, n. 29 (1994) (emphasis added). Further, Multi-Flow itself distributes the national brands to local establishments, in the case of Coca-Cola to "retail outlets that hold a valid liquor, beer or wine license. . . , *but that are not part of a chain of five or more units*. . . ," and in the case of

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[S]ubmarket indicia are best viewed as 'proxies for cross-elasticities of supply and demand, and thus the identification of a submarket is in principle no different than the identification of a relevant market. . . .'" P. Areeda, Antitrust Law (hereinafter "Areeda"), ¶ 533 at 172-73 (1996) (citations omitted).

PepsiCo, to customers "*currently purchasing less than three hundred gallons of postmix syrup per year. . . .*" In addition, the Affidavits of Larry Smith, himself a veteran of the fountain beverage industry, and the Affidavit of Ralph W. Lindemann, assert that there are indeed differences between the service offered by the national brands and that offered by local distributors such as Multi-Flow. These include fulfillment of greater requirements on the part of most taverns and locally owned restaurants for specialized products and mixers, price consciousness as opposed to brand loyalty, and a greater demand for service.

This evidence demonstrates that the national brands consider these customers to be in a separate market from national customers. In such circumstances, the jury might determine that sales to them belong in a separate market or submarket. Tenneco, 98 F.T.C. 464, 580-81 (1981), rev'd on other grounds, 689 F.2d 346 (2d Cir. 1982) (market for shock absorbers includes submarket for replacement shocks, owing to the elaborate distribution network necessary to market replacements).

Further, in the case of customers who serve alcohol, *the use of fountain beverages primarily for mixing drinks is a "peculiar use" of the product,* even if all establishments, regardless of ownership, use soft drinks to serve to their customers. At the very least, the jury should have been permitted to consider whether or not the use of fountain beverages for mixers was indicative of a separate market or

submarket tailored to this peculiar use. Hand v. Central Transport, 779 F.2d at 11.

Further, it is beyond dispute that *two distinct groups of customers exist in this case,* one of which happens to consist almost entirely of larger national customers, and the other of taverns and locally owned restaurants. Hence the facts of this case not only show that there are "larger" and "smaller" customers; as the courts below were quick to point out; but also that larger customers deal almost exclusively with national brands, while smaller local customers deal almost exclusively with the only local supplier, Multi-Flow. There facts are readily distinguishable from those of T. Harris Young, relied upon by the courts below. In that case, the plaintiff attempted to distinguish between "200+ beds" hospitals and smaller hospitals who purchased EKG monitoring paper, even though the evidence showed no demonstrable difference in purchasing by "200+ beds" hospitals and smaller hospitals, and that both large and small hospitals purchased EKG paper from the *same suppliers* in the *same relative proportions.* T. Harris Young, 931 F.2d at 820.

Here, the evidence demonstrates that *specialized full service beverage distribution vendors operate in a submarket separate from door drop vendors.* Reasonable jurors could likely conclude that distribution services specially designed *for a certain group of purchasers* have been fashioned here, and that the suppliers concentrate their efforts almost exclusively on those purchasers. As Areeda has noted, the mode of distribution

alone can signal the existence of a different market:

> Sometimes a mode of distribution gives a firm or group of firms a significant cost advantage over others who cannot readily copy this mode. In that case, placing the former firms in a distinct relevant market makes sense. . . .

Areeda, ¶ 564 at 274-74. The "total service" demanded by smaller, local customers (as opposed to the "door drop" delivery offered by national brands) also explains the development of specialized vendors in response to that demand. Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 714 (7th Cir. 1979) (differences in the total service provided by drive-thru photofinishing as compared to conventional retailing are reflected by industry perception of separate economic entity, price differential and consumer perception).

In this case, the existence of a submarket is even more apparent than in Photovest, where the end product was "nearly identical" to that offered by other retailers; but the court found differences in the "total service" based upon the drive-thru marketing method. Here, it is undisputed that Multi-Flow (and All-Syrups) provided services (beyond "door drop" delivery) and products (such as generics and mixers) which the national distributors did not, to a distinct group of customers who demanded them. Hence, "total service" is clearly distinct from that offered by the national distributors and, except in cases where Multi-Flow customers purchase only the national brand and nothing else, the products themselves are not "nearly

identical" at all.

Such clusters of products and services offered by a vendor may delineate a separate product market. United States v. Philadelphia National Bank, 374 U.S. 321 (1963) (commercial banking); United States v. Connecticut National Bank, 418 U.S. 660-66 (1974) (same); United States v. Phillipsburg National Bank & Trust Co., 399 U.S. 350, 379-83 (1970) (same). Here, a jury could well find that economies of scope make distribution of the cluster of fountain beverage products, other beverages and mixers, and service cheaper per good than distribution of each separately. The jury could also find that national distributors, which supply only one of the products in the cluster (their own brand of syrups), could not easily add the others as well, given the fact that the national brands are closed shops paying higher labor costs. *Simply stated, where the economies exist, but suppliers of only one of the clustered product can not readily duplicate the combination, a separate market exists.* Areeda, ¶ 565 at 276-77; Hovenkamp, § 3.3 at 97.

Finally, *distinct pricing* is a clear indicator that a separate market may exist. Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 714 (7th Cir. 1979). Hence, an inquiry into pricing and, in particular, cross-elasticity of demand, demonstrates "the extent to which customers will change their consumption of one product in response to a price change in another. . . ." Eastman Kodak, 112 S.Ct. at 2083. Products are likely to be in the same market if a *slight* decrease in the

price of one causes customers of similar products to switch to the lower priced product. du Pont, 351 U.S. at 400 (emphasis added).

Here, Petitioners were not given the opportunity to conduct discovery with respect to pricing, and were thus unable to develop their case in order to demonstrate the low cross-elasticity of demand between the services offered by the national brands and the services formerly offered by All Syrups and now offered by the only remaining local alternative, Multi-Flow. Summary disposition of Petitioners' case without even the opportunity to conduct discovery on this issue is reversible error, as more information was necessary to make this determination. White & White, 723 F.2d at 507.

CONCLUSION

Accordingly, Petitioners respectfully request that this Honorable Court grant their petition for writ of certiorari.

Respectfully submitted,

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No. 96-4185

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY S. SMITH and ALL SYRUPS, INC.,	)	
Plaintiffs-Appellants,	)	
v.	)	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**
MULTI-FLOW DISPENSERS OF OHIO, INC.,	)	
Defendant-Appellee.	)	

Before: NELSON, BOGGS, and SILER, Circuit Judges.

DAVID A. NELSON, Circuit judge. This case demonstrates the importance of properly defining the relevant market for purposes of adjudicating an antitrust claim. Because an alleged monopolist's market share will be calculated in terms of the relevant market, a plaintiff charging an antitrust violation will want the relevant market to be narrowed as much as possible, thereby enlarging the alleged monopolist's share as much as possible. Alleging a too narrow market, however, can prove fatal to a plaintiff's antitrust claim.

In the case at bar, which arises under § 2 of the Sherman Act, 15 U.S.C. § 2, the plaintiffs alleged that the defendant monopolized the market for supplying beverage-dispensing equipment/services and flavored syrups to taverns and locally owned restaurants in the Cleveland metropolitan area. The district court granted a motion to dismiss the plaintiff's amended complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court reasoned that non-locally owned restaurants had been excluded from the relevant market unnecessarily, there being no allegation that the products and services provided to such restaurants differed from the products and services provided to locally owned restaurants. Upon *de novo* review, we find ourselves in agreement with this reasoning; the judgment entered by the district court will therefore be affirmed.

I

The defendant, Multi-Flow Dispensers of Ohio, Inc., sells, leases and services beverage dispensing equipment in the metropolitan Cleveland area. It also sells a variety of flavored beverage syrups, including national brand soft drink syrups such as Coca-Cola and Pepsi-Cola; its own premium brand carbonated syrups; and non-carbonated drink mixes, such as flavored teas, lemonade, juices, and non-alcoholic bar mixes.

In January, 1990 plaintiff Larry S. Smith, a former independent sales representative for Multi-Flow, formed All Syrups, Inc., to sell, lease and service beverage dispensing equipment in and around Cleveland. All Syrups also sold

flavored beverage syrups.

By October of 1990, according to the amended complaint, Multi-Flow was engaging in a variety of anti-competitive practices calculated to drive All Syrups out of business. Multi-Flow allegedly used predatory pricing techniques to induce customers of All Syrups to contract with Multi-Flow; removed All-Syrups' equipment from customers that had rented the equipment; made intimidating and threatening statements to Mr. Smith in an effort to induce him to cease competing with Multi-Flow; and purchased Coca-Cola distribution rights from All Syrups' supplier in order to prevent All Syrups from obtaining Coca-Cola products.

Smith and All Syrups brought the present suit against Multi-Flow in 1993, alleging violation of the Sherman Act and asserting various state law claims. Multi-Flow filed an answer and counterclaim.

After some initial discovery, Multi-Flow moved for summary judgment on the ground, among others, that the complaint failed to settle on a single relevant product market. In paragraph 7 of the complaint, for example, the plaintiffs alleged that the parties competed in the market of "selling, leasing and servicing syrup dispensing equipment and supplying flavored syrups for carbonated beverages"; in paragraph 8 they alleged that Multi-Flow "controlled the vast majority of the market for selling, leasing and servicing soft drink beverage dispensing equipment and supplying flavored syrups for carbonated beverages to taverns and restaurants in the

Cleveland metropolitan area"; and in paragraph 9 they alleged that All Syrups competes in the market for "beverage dispensing equipment for sale or lease, and supplying off-brand syrups to restaurants and taverns in the Cleveland metropolitan area."

The plaintiffs responded that the complaint relied on only one relevant product market, the market for "supplying flavored beverage syrups, as well as mixers and other products, together with delivery systems and services to restaurants and taverns" in the Cleveland metropolitan area. In support of this market definition, the plaintiffs presented two affidavits -- one from plaintiff Smith and the other from Professor Ralph W. Lindeman -- indicating that the restaurants and taverns serviced by Multi-Flow were a distinct submarket in the Cleveland metropolitan area.

In ruling on the summary judgment motion, the district court expressly noted the market definition that the plaintiffs had asserted in response to the motion. Relying on this definition, the district court concluded that issues of fact precluded grant of summary judgment for Multi-Flow.

The plaintiffs subsequently requested leave to file an amended complaint "in order to remove any doubt that the only product market identified by Plaintiffs has been that for supplying beverage dispensing systems, service and flavored syrups to taverns and restaurants" in the Cleveland metropolitan area. The amended complaint itself, however, provided a more limited definition of the relevant market: it defined the relevant market in terms of supplying beverage dispensing equipment and

related services, and flavored syrups, mainly *to taverns and locally owned restaurants* . . . in the Cleveland metropolitan area." (Emphasis supplied).

Multi-Flow responded to the amended complaint by moving to dismiss it under Rule 12(b)(6), Fed. R. Civ. P. In this connection Multi-Flow argued that the new definition of the relevant market excluded substantial numbers of potential customers -- specifically, non-locally owned restaurants -- without a basis for doing so.

After responding to the motion, the plaintiffs sought additional discovery. Multi-Flow moved for a stay of discovery pending resolution of the motion to dismiss, arguing that discovery was not needed to resolve the issues of law. The district court granted Multi-Flow's request and stayed discovery.

During a subsequent status conference, the district court indicated that it was inclined to grant the pending motion to dismiss; the plaintiffs, however, were invited to file a supplemental memorandum in opposition to the dismissal motion. The plaintiffs did file such a memorandum, arguing, among other things, that the materials already before the district court (specifically including the affidavits from Mr. Smith and Professor Lindeman) demonstrated that the plaintiffs' market definition was based on economic realities and thus should be deemed proper.

Unpersuaded by the supplemental memorandum, the district court granted the motion to dismiss. Although

acknowledging that a product market can be limited to a distinct customer group for purposes of a Sherman Act claim, the district court held that any such limitation must be based on a difference in the product supplied to the particular customer group. Because the plaintiffs had offered no basis for concluding that the product offered to "taverns and locally owned restaurants" differed from the product used by non-locally owned restaurants, the district court rejected the product market alleged in the amended complaint and granted the motion to dismiss.

The district court further held that the evidence in the record did not save the plaintiff's flawed market definition. And given the demise of the Sherman Act claim, the district court declined to exercise jurisdiction over the pendent state law claims. Multi-Flow subsequently dismissed its counterclaims without prejudice, and the plaintiffs' appeal followed.

The plaintiffs argue on appeal that the relevant market delineated in the amended complaint mirrors the economic realities of the beverage dispensing business. More specifically, the plaintiffs argue that non-locally owned restaurants usually contract for beverage dispensing services and products on a nationwide basis and thus should not be considered potential customers for local beverage dispensing companies. For reasons to which we shall turn shortly, however, it seems to us that the plaintiffs' argument misconceives the nature of the relevant "product" market.

II

To succeed on a claim under § 2 of the Sherman Act, a plaintiff must plead and prove that the defendant possessed monopoly power in the relevant market and acquired or maintained that power willfully, as opposed to gaining the power as a result of a superior product, business acumen, or historical accident. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The relevant market is coextensive with the "area of effective competition" -- the area over which the defendant has allegedly acquired monopoly power. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

The Supreme Court has made it clear that "[t]he 'area of effective competition' must be determined by reference to a product market. . . and a geographic market . . . ." *Id.* In the case *sub judice*, the parties do not dispute that the relevant geographic market is the metropolitan Cleveland area; their dispute centers on the product market to be used in determining whether Multi-Flow has acquired monopoly power.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* at 325. In layman's terms, a product market refers to the universe of "products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service." *White & White v. American Hospital Supply, Inc.*, 723 F.2d 495, 500 (6th Cir. 1983).

Within the universe of a product market, there may exist a submarket -- a portion of the product market that, for antitrust purposes, is considered a separate market. *Brown Shoe Co. v. United States*, 370 U.S. at 325. "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* Submarket analysis, however, is part and parcel of the "reasonable interchangeability" test. *White and White*, 723 F.2d at 501 (discussing *Brown Shoe Co.*). The submarket analysis helps to flesh out the types of products that are or are not "reasonably interchangeable." *Id.* at 502.

The submarket alleged by the plaintiffs here consists of the market for supplying beverage dispensing equipment and related products and services to taverns and locally owned restaurants[1] in metropolitan Cleveland. Applying the analysis explained by the Supreme Court in *Brown Shoe*, we conclude that the submarket alleged by the plaintiff fails as a matter of

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[1] In their brief on appeal, the plaintiffs occasionally refer to the submarket in terms of "local taverns and restaurants." The amended complaint clearly alleges a market including all taverns and locally owned restaurants, however, so we disregard any belated effort to further limit the market to locally owned taverns.

law.

In support of their defined market, the plaintiffs argue that the soft drink industry itself recognizes taverns and locally owned restaurants as a distinct submarket and treats smaller customers as a distinct group. The plaintiffs contend that national brand soft drink providers such as Coca-Cola and PepsiCo concentrate their sales efforts on chain establishments, thus creating a submarket for customers that are not part of a national chain. Indeed, the plaintiffs point out, Multi-Flow's contract with Coca-Cola allows Multi-Flow to distribute Coca-Cola products only to retail outlets that are not part of a chain of five or more units. And Multi-Flow's contract with PepsiCo similarly limits Multi-Flow's ability to distribute Pepsi products to customers that purchase less than three hundred gallons of beverage syrup per year.

The fact that national concerns prefer larger customers -- generally customers with multiple retail outlets -- does not mean that smaller customers should be deemed a submarket for antitrust purposes. See *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 933 (9th Cir. 1975) (concluding that a customer group's ability to purchase in greater volume was no reason to exclude the remaining customers from the relevant market, expecially because there was no difference between the product offered to all customers). Stated differently, the mere fact that national brand distributors choose to concentrate their sales efforts on larger, national customers says nothing about whether the products offered by

the national distributors are reasonably interchangeable with products sold by local providers. The plaintiffs allege, indeed, that Multi-Flow sells the same national brand products, thus suggesting that the products are identical and interchangeable. And although the plaintiffs make much of the fact that Coca-Cola and PepsiCo have contractually limited Multi-Flow's ability to sell to chain customers, this fact only demonstrates that the national brand distributors consider Multi-Flow a potential competitor for their larger customers.

The plaintiffs also argue that many customers for beverage dispensing systems use generic soft drinks as "mixers," a base for an alcoholic drink. But the plaintiffs have not demonstrated how this "peculiar use" of soft drinks is tied to the submarket they propose. If this use of soft drinks has generated a distinct submarket, the submarket should be defined in terms of the peculiar use; that is, the market for soft drinks that are used as mixers. Without a link between the alleged peculiar use and the submarket chosen by plaintiffs, the datum that some of the customers use the product for a peculiar use is of no relevance to the submarket analysis.

Plaintiffs also assert that Multi-Flow offers more "total services" -- namely door drop delivery and generic syrups -- than the national beverage providers. But this "total service" difference offered by Multi-Flow does not explain why the submarket should be limited to taverns and locally owned restaurants. There is no allegation that non-locally owned restaurants could not use all of the services provided by Multi-

Flow. Plaintiff's arguments in this regard look rather like an attempt to define the relevant market in terms of Multi-Flow's own customer base.

In the end, we are most persuaded by the handful of cases that have held that an antitrust plaintiff may not narrow a relevant product market to a select group of customers without identifying a difference in the *product* supplied to that group of customers. *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 824 (11th Cir. 1991) ("While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to these customers"); *Re-Alco Indus., Inc. v. National Center for Health Educ., Inc.*, 812 F. Supp. 387, 391 (S.D.N.Y. 1993) ("If a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products. . . a court may grant a Rule 12(b)(6) motion."); *Redmond v. Missouri Western State College*, 1988 WL 142119 (W.D. Mo. 1988) ("Classes of prospective purchasers are not separated, and it seems unprecedented to allow a claim that a defendant has monopolized a class of customers as distinguished from a product or service").

We note that pretrial dismissal of an antitrust complaint on the ground urged by the defendant is uncommon, determination of the relevant product market often being a factual inquiry. There is not, however, a "*per se* prohibition against dismissal of antitrust claims for failure to plead a relevant market. . . ." *Queen City Pizza v. Domino's Pizza*, 124

F.3d 430, 436 (3d Cir. 1997). As the Court of Appeals for the Third Circuit reasoned in *Queen City Pizza,* "Where the plaintiff. . . alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products. . ., the relevant market is legally insufficient and a motion to dismiss may be granted." *Id.* On the record before us, we conclude as a matter of law that the plaintiffs have failed to justify their narrow definition of the relevant market. That being so, and there being no contention that the defendant has monopolized a market that includes non-locally owned restaurants, we **AFFIRM** the judgment of the district court.

No. 96-4185

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY S. SMITH, et al.,	)	CASE NO. 1:93CV1165
	)	
Plaintiffs,	)	Judge John M. Manos
	)	
v.	)	
	)	
MULTI-FLOW DISPENSERS OF OHIO, INC.,	)	
	)	
	)	MEMORANDUM OF
Defendant.	)	OPINION

On June 2, 1993, Larry S. Smith and All Syrups, Inc. (All Syrups), plaintiffs, filed the above-captioned case against Multi-Flow Dispensers of Ohio, Inc. (Multi-Flow), defendant, pursuant to the Sherman Anti-Trust Act, 15 U.S.C. § 2 (Count One). They also allege pendent state claims: tortious interference with contractual relations (Count Two); conversion (Count Three); and restraint of trade in violation of Ohio Revised Code §§ 1331.01, et seq. (Count Four). On August 31, 1993, Multi-Flow filed an amended answer and counterclaims which allege violations of the Lanham Act, 15 U.S.C. §1125(a)(1) (Counterclaim One), tortious interference with contract and business relations (Counterclaim Two), unfair competition (Counterclaim Three), violation of the Ohio

Deceptive Trade Practices Act, Ohio Revised Code § 4165.02 (Counterclaim Four), and conversion (Counterclaim Five).

On February 23, 1995, Multi-Flow filed a motion for summary judgment on plaintiffs' claims. On march 10, 1995, plaintiffs filed a brief in opposition. For the following reasons, summary judgment is granted in part and denied in part.

I. FACTS

Multi-Flow leases beverage dispensing systems, sells concentrated beverage syrups and provides repair services for the beverage dispensing equipment it leases. It sells: national brand carbonated soft drink syrups, such as Coke and Pepsi; its own premium brand carbonated soft drink syrups; and non-carbonated drinks, such as flavored teas, lemonade, juices, and non-alcoholic bar mixes.

Larry S. Smith is President of All Syrups and a former Multi-Flow employee. All Syrups also sells, leases, and services beverage dispensing equipment, and supplies flavored beverage syrups.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) sets forth the standard for granting a motion for summary judgment. It states in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law. . . .

This standard has been explained by the U.S. Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986), Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S. Ct. 1348 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986).

In Anderson, the Court set out the requisites needed to show that there is no genuine issue as to a material fact. The Court stated:

> [a]s to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

Anderson, 106 S. Ct. at 2510. The Court also held that "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id.

Summary judgment is not appropriate if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. However, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 2511. The nonmoving party has the burden of producing the evidence, and the "mere existence of a scintilla of evidence in support of the plaintiffs' position will be insufficient; there must be evidence on which a jury could reasonably find for the plaintiff." Id. at 2512. If evidence is not presented, summary judgment is appropriate.

Once the moving party has met its burden under Rule 56(c), the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 106 S. Ct. at 1356. However, any inferences from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Id.

In Celotex, the Court explained that the nonmoving party must designate specific facts showing a genuine issue for trial. Summary judgment is appropriate if a party, after adequate time for discovery, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 106 S. Ct. at 2552. The moving party is not required to prove the absence of a genuine issue of fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Id. at 2554. "Instead. . . the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id.

The Celotex Court also stated that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses," Id., and that the summary judgment procedure should not be regarded as a "disfavored procedural shortcut" but should be viewed as "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 2555.

III. ANALYSIS

A. ANTITRUST CLAIMS

The offense of creating a monopoly under section 2 of the Sherman Anti-Trust Act has two elements: (1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from its growth or development as a consequence of a superior product, business acumen or historic accident. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 2079 (1992). Monopoly power is defined as "the power to control prices or to exclude competitors." United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1956); White & White v. American Hosp. Supply Corp., 723 F.2d 495, 507 (6th Cir. 1983).

To determine whether the defendant possesses monopoly power, the relevant market must be defined. Spectrum Sports, Inc. v. McQuillan, ___ U.S. ___, 113 S.Ct. 884, 890 (1993); United States v. Grinnell Corp., 384 U.S. 563, 570 (1966). The relevant market is determined by the trier of fact. du Pont, 351 U.S. at 381; White & White, 723 [F.2d] at 499-500.

The plaintiff bears the burden of proof in establishing the limits of the relevant market. Id. at 891. The defendant is entitled to summary judgment if it establishes that the market it defines "describe[s] actual market behavior so accurately that the [non-moving party's] assertion of market power. . ., if not implausible, is at least unreasonable." Eastman Kodak, 112

S.Ct. at 2084.

The relevant market includes products that are reasonably interchangeable or have a high cross-elasticity of demand. du Pont, 351 U.S. at 381-95. Products are reasonably interchangeable when they have similar end-uses and physical characteristics. Id. at 399-400. However, they do not need to be fungible. du Pont, 351 U.S. at 377 (cellophane and other flexible wrapping materials compete in the same market); see United States v. Continental Can Co., 378 U.S. 441 (1964) (metal and glass containers compete in the same market). Furthermore, products and services that are not interchangeable can be combined in a single market "where the combination reflects commercial realities." Grinnell, 384 U.S. at 572 (fire and burglary services included in same market even though they were not interchangeable).

Cross-elasticity of demand focuses on "the extent to which customers will change their consumption of one product in response to a price change in another. . . ." Eastman Kodak, 112 S.Ct. at 2083. Products are likely to be in the same market if a slight decrease in the price of one causes customers of similar products to switch to the lower priced product. du Pont, 351 U.S. at 400. Conversely, products are generally held to be in different markets if their cross-elasticity of demand is low, meaning that price changes in one product cause little or no change in demand for similar products. Cross-elasticity of demand does not require products to compete at the same price level. American Crystal Sugar Co. v. Cuban-American Sugar

Co., 259 F.2d 524, 529-30 (2d Cir. 1958) (even though beet sugar sold for 20 cents per hundredweight below cane sugar, the court found a high cross-elasticity of demand because a change in the price of one produced a "prompt and corresponding price change in the other"). Furthermore, products with low cross-elasticity of demand have been held to be in the same market because of significant end-use competition. See Continental Can, 387 U.S. at455-56 (low cross-elasticity of demand was relevant but not determinative of whether the products competed in the same market).

Submarkets can be defined within a larger market. Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Grinnell Corp., 384 U.S. 563 (1966).[1] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." Brown Shoe, 370 U.S. at 336-37. There are seven "practical indicia" of a submarket: industry or public recognition of the submarket as a separate economic entity;

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[1] Brown Shoe was brought under Section 7 of the Clayton Act. However, the Supreme Court has recognized that "[i]n § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act, there may be submarkets that are separate economic entities." Grinnell, 384 U.S. at 572.

peculiar characteristics and uses of the product; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors. Id. at 523.[2] In Brown Shoe, the Court held that men's, women's, and children's shoes were each relevant submarkets within the broad market for the sale of shoes because the evidence established that each type o fshoe was recognized by the public as a distinct product line; was manufactured in a separate plant; had characteristics that rendered in non-competitive with the others; and was directed toward a distinct class of customers. Id. at 326.

Multi-Flow argues that it is entitled to summary judgment because plaintiffs define three relevant product markets in their complaint, instead of only one: (1) the sale of "non-national brand name" or "off-brand" beverage syrups, dispensing equipment, and services (Complaint at ¶¶ 7,9, 14); (2) "the market for selling, leasing and servicing soft drink beverage dispensing equipment and supplying flavored syrups for carbonated beverages" (Id. at ¶¶ 7, 8); and (3) "the market for beverage dispensing systems, services and supplies" (Id. at ¶¶ 12, 15(c), 19, 21(a)).

Plaintiffs in their brief in opposition state that the

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The absence of one or more of these seven indicia does not preclude the finding of a submarket. Abex Corp. v. FTC, 420 F.2d 928 (6th Cir.), cert[.] denied, 400 U.S. 865 (1970) (distinct price, peculiar characteristics and uses, and separate production facilities sufficient for finding of submarket).

relevant market is: the business of supplying beverage dispensing equipment, flavored beverage syrups (regardless of brand and carbonation), and repair services for leased equipment, to bars and restaurants in the metropolitan Cleveland area, consisting of Ashtabula, Cuyahoga, Geauga, Lake, Lorain, and Summit counties.

Multi-Flow argues that the relevant market plaintiffs define is too narrow to be economically realistic. It argues that the relevant market is: the sale of all brands of carbonated, non-carbonated, fountain dispensed or bottled soft drinks, including Coke and Pepsi, to any establishment that sells beverages for consumption (i.e. bowling alleys, theaters, convenient stores, etc.). In support of this market definition, it submits the affidavit and report of its expert, David P. Kaplan, President of Capital Economics, a consulting firm in Washington, D.C., and co-author of "Competition & Concentration -- Economics of the Carbonated Soft Drink Industry." He states that national, regional, and local brand soft drink products all compete in the same market, but that national brands such as Coke and Pepsi and regional brands such as Cotton Club dominate it. (Kaplan Report at pp. 4-5). He further states, "it is not likely that Multi-Flow could exercise market power in the sale of carbonated soft drinks, i.e., restrict output and raise prices above competitive levels given the competitive viability of Coca-Cola, PepsiCo, other carbonated soft drink competitors and competition from other beverage products." (Id.)

Plaintiffs argue that the sale of beverage dispensing equipment and flavored beverage syrups to bars and restaurants is a submarket within the broad market Multi-Flow defines. They submit the affidavits of plaintiff Larry Smith and their expert, Ralph Linderman, an Assistant Professor of Business Technologies at Kent State University and Research Director of Strategic Concepts, an organization "which specializes in economics and litigation economics". (Linderman Aff. ¶ 1). Linderman states that he "considers the bar and restaurant market serviced by Multi-Flow to constitute a separate product market because of the peculiar uses for which soft drinks are often used in this market, the distinct customer market, the different price expectations of its customers and the specialized nature of the distribution business involved, which includes the sale of mixers and other items peculiar to the tavern business." (Id. at ¶ 4). He further states that companies which market soft drinks in bottles and cans do not compete in this market because their products are more expensive (Id. at ¶ 7), and manufacturers of national brands (i.e. Coke and Pepsi) do not compete in this market because:

> (1) obtaining the lowest price is the primary consideration among Multi-Flow customers; (2) brand name is virtually irrelevant, especially to bar operators whose patrons apparently have no preference regarding which brand of mixer is used in preparing their drinks; (3) quality is less relevant, for the same reason; (4) Multi-Flow

> operates an open shop, and so enjoys an advantage over national brands, who must pay their drivers union scale; (5) Multi-Flow itself distributes these brand name products to its accounts, and so faces virtually no competition from their manufacturers; and (6) the national brands can themselves avoid potential antitrust problems by allowing the Multi-Flows of the world to stay in existence.

(Id. at ¶ 8). Finally, he states that there is a low cross-elasticity of demand between the products and services offered by Multi-Flow and those of Coke and Pepsi. (Id. at ¶ 9).

The determination of the relevant market is a question of fact for the jury. White & White v. American Hospital Supply, Inc., 723 F.2d 495, 499-500 (6th Cir. 1983). Plaintiffs have produced evidence in support of their definition of the relevant market from which a reasonable jury could find in their favor. Multi-Flow has produced conflicting evidence. Therefore, there is a genuine issue of material fact, and summary judgment is denied. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

B. TORTIOUS INTERFERENCE WITH CONTRACT AND CONVERSION

Plaintiffs claim that Multi-Flow, through Klein and other employees, tortiously interfered with All Syrups' contractual relations and converted beverage dispensing equipment owned by All Syrups.

A claim for tortious interference with contract requires proof that one, without privilege to do so, induced another not to enter into or continue a business relationship with a third party. Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir. 1981), cert. denied, 456 U.S. 991 (1982) (quoting Juhasz v. Quik Shop, Inc., 55 Ohio App.2d 51, 57, 379 N.E.2d 235, 238 (Summit Cty. 1977)). A person is privileged to cause another not to enter into or continue a contract if that person acts in good faith to protect a legal right. Paramount Supply Co. v. Sherlin Corp., 16 Ohio App.3d 176, 181, 475 N.E.2d 197, 203 (Cuyahoga Cty. 1984).

Conversion is defined as "any exercise of dominion or control wrongfully exerted over the personal property of another in denial of or under a claim inconsistent with his rights." Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co., 24 Ohio App.3d 91, 93, 493 N.E.2d 289, 292 (Franklin Cty. 1985).

Smith, in his affidavit, states that "Multi-Flow has, on many occasions, appeared at a customer's place of business and removed equipment which has been purchased on the secondary market by All-Syrups; replacing it with Multi-Flow delivery systems. Only a small fraction of this equipment has ever been returned to All Syrups." (Smith Aff. at ¶ 18). He further states that a Cuyahoga Heights police detective, Michael Angoicchi, went into Raphael's Party Center in Garfield Heights, with a Multi-Flow employee, and removed equipment owned by All-Syrups. (Id. at ¶ 19).

Multi-Flow argues that any actions it took were privileged because plaintiffs were attempting to sell equipment and syrup to its customers. It further argues that plaintiffs have damaged or taken Multi-Flow's equipment and induced its customers to breach their contracts. Finally, it asserts that it did not take control of any equipment owned by plaintiffs. (Antolino Aff., ¶¶ 23-26).

Genuine issues of material fact exist as to these claims, and summary judgment is denied. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

C. VALENTINE ACT CLAIM

Plaintiffs claim that Multi-Flow has conspired to form a trust in restraint of trade, in violation of the Valentine Act, Ohio Rev. Code § 1331.01, et seq. Section 1331.01 provides, in pertinent part:

> (A) 'Person' includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States . . .
>
> (B) 'Trust' is a combination of capital, skill, or acts of two or more persons for the following purposes:
>
> > (1) To create or carry out restrictions in trade or commerce; . . .
>
> A trust as defined in division (B) of this section is unlawful and void.

Ohio Rev. Code § 1331.01.

Plaintiffs claim that Multi-Flow conspired with its officers and employees, including Stanley Klein its principal owner, to form a trust in restraint of trade. Under Ohio law, a corporation cannot conspire with its officers to form a trust in restraint of trade because the acts of its officers are the acts of the corporation. Daily Monument Co. v. Crown Hill Cemetery Ass'n, 114 Ohio App. 143, 152, 176 N.E.2d 268, 274 (Summit Cty. 1961) (dismissed Valentine Act claim because "the acts of the officers in conducting the business of the association do not create a conspiracy"). Therefore, summary judgment is granted on this claim.

D. RES JUDICATA

Multi-Flow argues that plaintiffs' antitrust and conversion claims are barred by res judicata. On October 16, 1990, plaintiffs filed a case against Multi-Flow and nine other defendants in the Cuyahoga County Common Pleas Court alleging state antitrust violations, conversion, tortious interference with contract and several other claims. On October 9, 1991, the Common Pleas court dismissed the conversion and antitrust claims. The journal entry did not state that the claims were dismissed with prejudice, and pursuant to Ohio Rule of Civil Procedure 41(B)(3), a dismissal is with prejudice "unless the court, in its dismissal, otherwise specifies."[3]

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On November 1, 1991, the Common Pleas court dismissed the remaining claims with prejudice for failure to prosecute. However, on June 1, 1992, it granted Plaintiffs' motion for

The Full Faith and Credit Statute provides, in pertinent part, "judicial proceedings of any court of any . . . state . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the Courts of such State." 28 U.S.C. § 1738. Under this statute, this court must grant state court judgments the same preclusive effect as would courts of the state in which it was rendered. See Migra v. Board of Education, 465 U.S. 75, 104 S.Ct. 892 (1984).

Under claim preclusion, an earlier final judgment on the merits precludes a party from raising an issue in the new litigation that was or should have been advanced in the earlier proceeding, See Migra, 104 S.Ct. at 894; Duncan V. Peck, 752 F.2d 1135, 1138 (6th Cir. 1985). Claim preclusion is applied if the second suit is between the same parties and involves the same cause of action. Norwood v. McDonald, 142 Ohio St. 299, 305, 52 N.E.2d 67, 71 (1943). Here, there is identity of the parties, thus, the only question is whether the present claim involves the same cause of action as the earlier state court case.

The state case was filed in October, 1990 and alleged that Multi-Flow committed unlawful acts prior to that date. Here, the complaint alleges unlawful acts from April, 1990 to June, 1993. Any allegedly unlawful acts committed between April, 1990 and October, 1990 either were raised or could have been raised in the state court case. Therefore, res judicata bars

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relief from this judgment and modified the ruling to dismiss the remaining claims without prejudice.

their relitigation.

The plaintiffs in their brief in opposition state that they will only pursue claims based upon unlawful actions taken after the filing of the state case. These actions are not barred because they could not have been raised in the state case.

Accordingly, summary judgment is granted in part and denied in part.

IT IS SO ORDERED.

JOHN M. MANOS (/s)
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY S. SMITH, et al.,	)	CASE NO. 1:93CV1165
	)	
Plaintiffs,	)	Judge John M. Manos
	)	
v.	)	
	)	
MULTI-FLOW DISPENSERS OF OHIO, INC.,	)	
	)	MEMORANDUM OF
Defendant.	)	OPINION

On June 2, 1993, Larry S. Smith and All Syrups, Inc. (collectively "All Syrups"), plaintiffs, filed the above-captioned case against Multi-Flow Dispensers of Ohio, Inc. (Multi-Flow), defendant, alleging violation of the Sherman Anti-Trust Act and related state claims. On August 31, 1993, Multi-Flow filed an amended answer and counterclaims which allege violations of the Lanham Act, 15 U.S.C. §1125(a)(1) (Counterclaim One), tortious interference with contract and business relations (Counterclaim Two), unfair competition (Counterclaim Three), violation of the Ohio Deceptive Trade Practices Act, Ohio Revised Code § 4165.02 (Counterclaim Four), and conversion (Counterclaim Five).

On August 29, 1995, All Syrups filed an amended Complaint, which alleges violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2 (Count One), tortious interference

with contractual relations (Count Two); conversion (Count Three); and which requests injunctive relief (Count Four). On October 5, 1995, Multi-Flow filed a Motion to Dismiss. For the following reasons, the motion is granted.

I. FACTS

Multi-Flow sells, leases and services beverage dispensing systems and flavored beverage syrups. It sells: national brand carbonated soft drink syrups, such as Coca-Cola; its own premium brand carbonated syrups; and non-carbonated drink mixes, such as flavored teas, lemonade, juices, and non-alcoholic bar mixes.

Larry S. Smith is President of All Syrups and a former Multi-Flow employee. All Syrups also sells, leases, and services beverage dispensing equipment, and supplies flavored beverage syrups.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint fails to state a claim upon which relief can be granted if "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Complaint is to be construed in the light most favorable to the plaintiff and all factual allegations are to be construed as true. Scheuer v. Rhodes, 416 U.S. 232 (1974).

III. ANALYSIS

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from its growth or development as a consequence of a superior product, business acumen or historical accident. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966). "Monopoly power is the power to control prices or exclude competitors." United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1956).

To determine whether the defendant possesses monopoly power, the relevant market must be defined. Grinnell, 384 U.S. at 571. The plaintiff bears the burden of proof in establishing the limits of the relevant market. International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989), cert. denied, 494 U.S. 1066 (1990). The determination of a relevant market entails "articulation of a legal test which is then applied to the factual circumstances of each case." White & White v. American Hosp. Supply Corp., 723 F.2d 495, 499 (6th Cir. 1983). To even raise a question of fact, a plaintiff must allege a plausible product market. Shaw v. Rolex Watch U.S.A., Inc., 673 F. Supp. 674, 678 (S.D.N.Y. 1987).

The relevant market is defined by reference to (1) product or service, and (2) geography.[1] Brown Shoe Co. v.

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[1] For the present purposes, Multi-Flow does not dispute the

United States, 370 U.S. 294 (1962). "The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or services." White & White, 723 F.2d at 500. Products that are reasonably interchangeable or have a high cross-elasticity of demand are within the same product market. du Pont, 251 U.S. at 394-95. However, products need not be entirely fungible to compete. See du Pont, 351 U.S. at 400 (cellophane and other flexible wrapping material compete in the same market); United States v. Continental Can Co., 378 U.S. 441, 457 (metal and glass containers compete in the same market). Furthermore, products and services that are not interchangeable can be combined in a single market "where [the] combination reflects commercial realities." Grinnell, 384 U.S. at 572 (fire and burglary services, although not interchangeable, nonetheless are within the same relevant product market).

Cross-elasticity of demand focuses on "the extent to which customers will change their consumption of one product in response to a price change in another." Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072, 2083 (1992). Products are likely to be in the same market if a slight decrease in the price of one causes customers of similar products to switch to the lower priced product. du Pont, 351

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proposed geographical limitation to the relevant market. (Motion for Summary Judgment at 12 n.5.)

U.S. at 400. However, cross-elasticity of demand does not require that the products compete at the same price level. See American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524, 529-530 (2d Cir. 1958) (beet sugar and cane sugar compete in the same market even though beet sugar sold for 20 cents less per hundredweight; court found that a price change in one produced a "prompt and corresponding price change in the other."). Further, even products with a low cross-elasticity of demand can be within the same market where there is significant end-use competition. See Continental Can, 387 U.S. at 455-56 (low cross-elasticity of demand was relevant but not determinative; metal and glass containers competed in the same market based on end-use competition).

Submarkets can exist within a larger market. Brown Shoe, 370 U.S. at 325.[2] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." Id. There are seven "practical indicia" of a submarket: industrial or public

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[2] Brown Shoe was brought under Section 7 of the Clayton Act. However, the Supreme Court has recognized that "[i]n § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act, there may be submarkets that are separate economic entities." Grinnell, 384 U.S. at 572 (parenthetical omitted)..

recognition of the submarket as a separate economic entity; peculiar characteristics and uses of the product; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors. Id.[3]

All Syrups' Amended Complaint alleges that the relavant market is "the market for beverage dispensing systems, service and flavored syrups to taverns and locally-owned restaurants in metropolitan Cleveland."[4] (Amended Complaint at ¶ 12.) Multi-Flow filed a Motion to Dismiss, alleging that the Complaint did not contain a legally cognizable relevant market. Specifically, Multi-Flow argues that there is no basis for excluding regionally- and nationally-owned restaurants and taverns from the relevant market.[5] The Court agrees.

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Applying these factors, the Brown Shoe Court held that men's, women's, and children's shoes were each relevant product submarkets within the overall market of shoes. Id. at 326. The Court stressed that each product line was recognized as distinct by the public; each was manufactured in separate plants; and each had peculiar characteristics which rendered it generally noncompetitive with the others. Id.

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Plaintiffs define "metropolitan Cleveland" as the counties of Ashtabula, Cuyahoga, Geauga, Lake, Lorain and Summit. (Amended Complaint at ¶ 7.)

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Multi-Flow concedes that were the relevant market not

The relevant market must be defined by product or service and geography. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962). All Syrups' attempt to distinguish the customer market, differentiating between "larger" and "smaller" customers, rather than alleging product or service distinctions, is invalid as a matter of law. T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc., 931 F.2d 816, 824 (11th Cir. 1991), cert. denied, 502 U.S. 1013 (1991). "While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers." Id. (emphasis in original).[6]

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restricted to locally-owned taverns and restaurants, but included all taverns and restaurants in metropolitan Cleveland, the market would be proper for antitrust purposes. (Motion to Dismiss at 5.)

[6] In Harris Young, the plaintiff, a distributor of paper for electrocardiograph ("EKG") machines, alleged that the relevant market for antitrust pruposes was the sale of EKG paper to hospitals that had more than 200 beds. The plaintiff argued that sales to these larger hospitals constituted a submarket of the overall market of EKG paper sales. Id. The Eleventh Circuit rejected the market definition, noting that "the paper used by 200+ bed hospitals, smaller hospitals, clinics and doctors' offices does not differ." Id. at 825. Accordingly, the court ruled that the plaintiff had "failed to provide sufficient proof of the product

For a party to state a Sherman Anti-Trust Act claim, the complaint must allege a legally cognizable relevant product market. Rolex Watch, 673 F.Supp. at 678. Moreover:

> Plaintiff must explain why the market it alleges is in fact the relevant, economicallysignificant product market. If a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand . . . a court may grant a Rule 12(b)(6) motion.

Re-Alco v. National Center for Health Educ., 812 F.Supp. 387, 391 (S.D.N.Y. 1993) (emphasis added).

All Syrups' Amended Complaint does not allege a legally cognizable relevant market. The Complaint does not allege any facts that support limiting the relevant market to locally-owned establishments. The Complaint does not even allege that providing beverage dispensing equipment and syrups to locally-owned establishments is in fact distinct and non-competitive from providing the same services to non-locally-owned establishments. All Syrups has therefore not met its burden of providing a proper relevant market.[7]

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dimension of the market." Id. at 824.

[7] The Court likewise declines to exercise supplemental jurisdiction ove rthe state claims, and dismisses Counts Two through Four.

IV.

Even were the Court to look [to] matters outside the present pleadings, see Fed R. Civ. P. 12(b) & 56, and rely on motions and affidavits previously filed with this Court, as argued by the All Syrups, the motion must be granted. Plaintiffs have produced no evidence to support its theory of the relevant market.

All Syrups, relying on the affidavits of Larry S. Smith and Ralph W. Lindeman,[8] argue that the sale or lease of beverage dispensing equipment to locally-owned establishments constitutes a separate legal submarket. However, both affiants propose legally invalid markets, and neither supports the existence of a submarket.

Larry S. Smith, a plaintiff and President of All Syrups, avers that "the bar and restaurant market *serviced by Multi-Flow*" consititutes a separate market. (Smith Affidavit at ¶ 4 (emphasis added).) Similarly, Ralph W. Lindeman[9] states: "I

See United Mine Workers of America v. Gibbs, 383 U.S.715, 726 (1966).

[8] These affidavits were previously filed with this Court in support of plaintiffs' opposition to Multi-Flow's Motion for Summary Judgment, all of which was filed prior to the Amended Complaint.

[9] Lindeman is an Assistant Professor of Business Technologies at

consider the bar and restaurant market *serviced by Multi-Flow* to constitute a separate product market." (Lindeman Affidavit at ¶ 4 (emphasis added).) Neither market is valid as a matter of law, for both affiants attempt to limit the market to Multi-Flow's customers. Every company has a monopoly over its own customers, see Re-Alco, 812 F.Supp. at 392, but this natural monopoly does not violate the Sherman Act. TV Communications Network v. Turner Network, 964 F.2d 1022, 1025 (10th Cir.), cert. denied, 113 S.Ct. 601 (1992). A relevant market includes all products that are reasonably interchangeable -- not simply the customers of a company. Rolex Watch, 673 F.Supp. at 678.

Both affiants also aver that locally-owned establishments are less concerned with brand name and quality, and that price alone is the primary consideration among these customers. (Smith Affidavit at ¶ 5; Lindeman Affidavit at ¶ 8.) However, even assuming the truth of such statements, this merely shows tht locally-owned establishments are more likely to prefer generic flavored syrups over national brand name syrups. This is not evidence that the *service* of providing beverage dispensing equipment and syrups to locally-owned establishments is distinct and non-competitive with providing the same service to non-

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Kent State University and the founder and Research Director of Strategic Concepts, a litigation economics firm. (Lindeman Affidavit at ¶ 1.)

locally owned establishments.[10]

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[10] The affiants' further assertions tht locally-owned establishments constitute a submarket due to the "peculiar uses" to which they use soft drinks is likewise unconvincing. (Smith Affidavit at ¶ 5; Lindeman Affidavit at ¶ 4.) All establishments, regardless of ownership, use soft drinks for the same purpose: to serve to their customers. That locally-owned establishments may choose to serve or mix generic colas, as opposed to national brand name drinks, is not proof of submarket existence. Any attempt by the plaintiffs to argue that the service of providing generic syrups is a separate submarket that that of providing national brand name syrups must likewise fail. Generic products compete within the same market as their name brand competitors due to their "reasonable interchangeability." Tarrant Service Agency v. American Standard, 12 F.3d 609, 615 (6th Cir. 1993), cert. denied, 114 S.Ct. 2709 (1994).

Accordingly, the Court grants the motion, and dismisses the Amended Complaint.[11]

IT IS SO ORDERED.

JOHN M. MANOS (/s)
UNITED STATES DISTRICT JUDGE

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[11] To the extent that this Opinion is inconsistent with this Court's August 18, 1995 Opinion, Docket No. 96, that Opinion is hereby modified. See Gillig v. Advanced Cardiovascular Systems, Inc., 67 F.3d 586, 589 (6th Cir. 1995).

15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Supreme Court, U.S.
FILED
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No. 99-361

IN THE
Supreme Court of the United States

LARRY S. SMITH AND ALL SYRUPS, INC.,

Petitioners,

v.

MULTI-FLOW DISPENSERS OF OHIO, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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1688

QUESTION PRESENTED

Whether the courts below properly dismissed an actual monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, for failure to either plead or proffer sufficient evidence of a relevant product market.

PARTIES TO THE PROCEEDINGS

All parties below are listed in the caption. Respondent Multi-Flow Dispensers of Ohio, Inc. has no parent corporation or publicly held company that owns 10 percent or more of its stock.

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STATEMENT OF THE CASE

Petitioners seek review of an unpublished court of appeals opinion unanimously affirming an unpublished district court opinion dismissing an actual monopolization claim for failure either to plead or to proffer sufficient evidence of a relevant product market. The court of appeals opinion decides no significant legal questions, but reflects only a straightforward application of settled market definition principles. Moreover, the petition for certiorari does not allege any circuit conflicts, and it is meritless. Further review in this Court is therefore unwarranted.

1. Respondent Multi-Flow Dispensers of Ohio, Inc. sells beverage products and services, including flavored syrups and dispensing equipment, to retail businesses in the Cleveland, Ohio metropolitan area. Petitioner Larry Smith is a former sales representative of respondent. In January 1990, Smith formed petitioner All Syrups, Inc., a competing beverage wholesaler. Petitioners then began a campaign of meritless and unsuccessful litigation against respondent. Pet. App. A2-A3.

In October 1990, petitioners filed a complaint against respondent and nine other defendants in the Court of Common Pleas of Cuyahoga County, Ohio. That complaint alleged various state antitrust violations, as well as claims for conversion, tortious interference of contract, and several other claims. After discovery, the antitrust and conversion claims were dismissed on the merits with prejudice, and the remaining claims were later dismissed for failure to prosecute. Pet. App. B14 & n.3.

In June 1993, petitioners filed another complaint against respondent in the United States District Court for the Northern District of Ohio. That complaint alleged an actual monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, as well as pendent state antitrust, conversion, and tortious interference claims. Pet. App. B1. For purposes of the Sherman Act claim, the complaint alleged at least three

distinct and contradictory product markets: "carbonated" beverages and related services; "carbonated" beverages and related services sold "to taverns and restaurants"; and "off-brand" beverages and related services sold "to restaurants and taverns." Pet. App. A3-A4. The alleged geographic market was the Cleveland metropolitan area. *Id.*

2. In February 1995, after discovery, respondent filed a motion for summary judgment. Pet. App. A3, B2. Respondent argued that summary judgment was appropriate because, among other reasons, petitioners had failed to identify a single relevant product market. Pet. App. B8.[1] In response, petitioners abandoned the product markets alleged in their complaint and, in their brief in opposition, alleged a fourth product market: beverages and related services ("regardless of brand and carbonation") sold "to bars and restaurants." Pet. App. B8-B9.

The district court granted the motion for summary judgment in part and denied the motion in part. The court accepted petitioners' redefined product market and concluded that the evidence about that market was genuinely disputed. The court therefore denied summary judgment on the Sherman Act claim. Pet. App. B9-B11. The court also denied summary judgment

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[1] Respondent also explained why, as a matter of law, none of the three product markets alleged in the complaint could support monopolization liability under Section 2. The alleged "off-brand" market, opportunistically defined to eliminate all competing sales of dominant national brands such as Coca Cola and Pepsi, was deficient under controlling circuit precedent, *see Tarrant Service Agency, Inc. v. American Standard, Inc.*, 12 F.3d 609, 615 (6th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994), holding as a matter of law that generic products compete against their brand-name counterparts. R. 67 at 11-18, CA6 App. at 1640-47. Moreover, under the other two market definitions alleged in the complaint, respondent would have a market share of under 18% — an amount that could not possibly support an inference of monopoly power. R. 67 at 18-19, CA6 App. at 1647-48.

on the conversion and tortious interference claims (Pet. App. B11-B13), but granted summary judgment on the state antitrust claim (Pet. App. B13-B14). Finally, the court granted summary judgment based on the preclusive effect of the prior state-court dismissal, but only with respect to conduct alleged to have occurred before October 1990. Pet. App. B14-B16.

3. Following the district court's summary judgment order, petitioners filed an amended complaint that changed their product market allegations yet again. The amended complaint alleged that the relevant market was beverages and related services sold "'to taverns and *locally-owned* restaurants in metropolitan Cleveland.'" Pet. App. C6 (quoting amended complaint) (emphasis added).[2] The amended complaint did not allege that the beverages and related services provided to locally-owned restaurants are different in any way from those provided to regionally-owned or nationally-owned restaurants. Pet. App. A2. On the contrary, it affirmatively alleged that all of these restaurants purchase "identical" beverage products. Pet. App. A10. Petitioners' market allegations thus focused not on distinctions among products, but on distinctions among sellers and buyers. Specifically, petitioners complained that many locally-owned restaurants purchased beverage products from respondent, whereas many regionally-owned and nationally-owned restaurants purchased the "same" products directly from large national manufacturers such as Coca Cola and PepsiCo. Pet. App. A9-A10.[3]

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[2] Petitioners' purported justification for filing the amended complaint was "'to remove any doubt'" about what market they had previously alleged. Pet. App. A4. In fact, however, the product market alleged in the amended complaint was far narrower than the product market that petitioners had previously alleged in opposing summary judgment. Pet. App. A4-A5.

[3] In attempting to so distinguish among sellers and buyers, petitioners apparently recognized that, if competing sales by Coca Cola and PepsiCo

Respondent moved to dismiss the amended complaint for failure to state a claim. Respondent argued that the market alleged in the amended complaint excluded, without justification, "substantial numbers of potential customers — specifically, non-locally owned restaurants." Pet. App. A5. After an initial round of briefing on the motion to dismiss, the district court indicated that it was inclined to grant the motion, but invited petitioners to file a supplemental memorandum in opposition. In that memorandum, petitioners asked the court to consider the evidentiary materials previously submitted in connection with the summary judgment motion. *Id.*

4. The district court granted the motion to dismiss the amended complaint. The court concluded that, "'[w]hile a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers.'" Pet. App. C7 (quoting *T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 824 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991)); *see also id.* ("differentiating between 'larger' and 'smaller' customers, rather than alleging product or service distinctions, is invalid as a matter of law"). Applying that principle, the court concluded that the amended complaint did not adequately allege a relevant product market:

> The Complaint does not allege any facts that support limiting the relevant market to locally-owned establishments. The Complaint does not even allege that providing beverage dispensing equipment and syrups to locally-owned establishments is in fact distinct and non-competitive from providing the same services to non-locally-owned establishments.

Pet. App. C8.

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were considered, petitioners could not possibly establish that respondent had monopoly power in the relevant beverage markets.

The district court further held that summary judgment would be proper even if it were to consider the evidentiary material previously submitted by petitioners. Those materials consisted primarily of two affidavits, from petitioner Smith and his expert, alleging as yet another relevant product market "'the bar and restaurant market *serviced by Multi-Flow*.'" Pet. App. C9-C10 (quoting affidavits). The court concluded that that this alleged market also was invalid as a matter of law, because "[a] relevant market includes all products that are reasonably interchangeable — not simply the customers of a company." Pet. App. C10.

5. In a unanimous and unpublished opinion, the court of appeals affirmed. In conducting its product market analysis, the court of appeals considered both the "reasonable interchangeability" and "cross-elasticity of demand" criteria established by this Court in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-404 (1956), as well as the "practical indicia" later identified in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Pet. App. A7-A8. The court reasoned that "identical" products are *a fortiori* "interchangeable," and must therefore be included within the same product market. Pet. App. A10. Accordingly, the court concluded that "an antitrust plaintiff may not narrow a relevant product market to a select group of customers without identifying a difference in the *product* supplied to that group of customers." Pet. App. A11 (emphasis in original) (citing *T. Harris Young*, 931 F.2d at 824). Because petitioners had identified no difference in the beverage products supplied to the various restaurants at issue, the court concluded that petitioners' attempted exclusion of regionally-owned and nationally-owned restaurants from the relevant product market amounted to an impermissible attempt "to define the relevant market in terms of Multi-Flow's own customer base." *Id.*

REASONS FOR DENYING THE WRIT

Petitioners seek review based on their remarkable claim that, even though locally-owned and other restaurants purchase the *same* beverage products from wholesalers, the products purchased by locally-owned restaurants constitute a *different* market from the products purchased by regionally-owned and nationally-owned restaurants. Petitioners allege no circuit conflicts, and they advance no other sound reason why this Court should consider such a transparently meritless claim.

1. In their questions presented (Pet. i) and argument headings (Pet. iii-iv), petitioners suggest that this case raises basic issues about the proper role of reasonable interchangeability, cross-elasticity of demand, and "practical indicia" in an analysis of the relevant product market. No such question is presented. For over four decades, it has been clear that products must be included within the same relevant market if they are "reasonably interchangeable." *See, e.g., du Pont*, 351 U.S. at 394-404. Both the court of appeals (Pet. App. A7) and the district court (Pet. App. C4) recognized this principle. It is equally clear that one important measure of interchangeability is the "cross-elasticity of demand" between the products at issue. *See, e.g., du Pont*, 351 U.S. at 394-95. Both the court of appeals (Pet. App. A7) and the district court (Pet. App. C4) recognized this principle as well. Finally, it is clear that the seven "practical indicia" identified by this Court in *Brown Shoe* (370 U.S. at 325) also can serve as important "evidentiary proxies for direct proof of substitutability." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987). Both the court of appeals (Pet. App. A8) and the district court (Pet. App. C5-C6) also recognized this principle.[4]

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[4] In emphasizing *Brown Shoe's* "submarket" terminology (Pet. 23), petitioners perhaps intend to suggest that the analyses of "practical

Far from calling these basic principles into question, the decision below reflects only their straightforward application. Under *du Pont* and its progeny, defining a product market involves assessing the extent to which *different* products are reasonably interchangeable, and thus fall within the *same* relevant market. *Compare United States v. Continental Can Co.*, 378 U.S. 441, 449-53 (1964) (metal and glass containers are reasonably interchangeable) *and du Pont*, 351 U.S. at 394-404 (cellophane and other forms of "flexible packaging material" are reasonably interchangeable) *with International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 249-50 (1959) (championship boxing and nonchampionship boxing are not reasonably interchangeable). The *same* product, however, cannot fall within *different* markets. As the court of appeals recognized, "identical" products (Pet. App. A10) are

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indicia" and of reasonable interchangeability are distinct. However, petitioners cite no authority for this suggestion, which the lower courts have overwhelmingly rejected. *See, e.g., Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 208 n.16 (3d Cir.) ("submarket" terminology "is somewhat confusing," because "relevant market" and "submarket" are coextensive), *cert. denied*, 513 U.S. 1066 (1994); *United States Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993) ("defining a 'submarket' is the equivalent of defining a relevant product market for antitrust purposes"), *cert. denied*, 512 U.S. 1221 (1994); *H.J., Inc. v. ITT Corp.*, 867 F.2d 1531, 1540 (8th Cir. 1989) ("the same proof which establishes the existence of a relevant product market also shows (or . . . fails to show) the existence of a product submarket"); *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495, 502 (6th Cir. 1983) (*Brown Shoe* "utilized the submarket indicia to more precisely answer the standard 'reasonable interchangeability' inquiry"); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc.*, 714 F.2d 351, 355 n.5 (4th Cir. 1983) ("relevant market" and *Brown Shoe* "submarket" are coextensive); P. Areeda, *Antitrust Law* ¶ 533, at 172-73 (1996) ("[S]ubmarket indicia are best viewed as 'proxies for cross-elasticities of supply and demand, and thus the identification of a submarket is in principle no different than the identification of a relevant market.'" (citation omitted)).

by definition "reasonably interchangeable" (351 U.S. at 395) within the meaning of *du Pont*. Further review is unnecessary to confirm that tautology.

Petitioners likewise err in complaining (Pet. 22-23) that the court of appeals failed to analyze cross-elasticity of demand. Any such analysis presupposes the existence of *different* products. As this Court recently explained, a "cross-elasticity of demand" measures the "extent to which consumers will change their consumption of *one* product in response to a price change in *another*." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 469 (1992) (emphases added). Having correctly concluded that the same product is "reasonably interchangeable" with itself (Pet. App. A10), the court of appeals can hardly be faulted for not also spelling out why it is analytically incoherent to address, as petitioners insist, the cross-elasticity of demand between a product and itself.

2. In concluding that "an antitrust plaintiff may not narrow a relevant product market to a select group of customers without identifying a difference in the *product* supplied to that group of customers" (Pet. App. A11) (emphasis in original), the court of appeals followed the Eleventh Circuit decision in *T. Harris Young*, which previously had held that, "[w]hile a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the *product* sold to those customers" (931 F.2d at 824 (emphasis in original)). Although petitioners assert that *T. Harris Young* was wrongly decided (Pet. 17-18), they do not cite a single lower-court opinion, much less a single court of appeals opinion, with which it is inconsistent. To our knowledge, the few lower-court cases addressing the issue are all consistent with the decision below and *T. Harris Young*. *See Smalley & Co. v. Emerson & Cuming, Inc.*, 808 F. Supp. 1503, 1512 (D. Colo. 1992) (granting summary judgment) ("a single product *sold to a single customer*, given uncontested

evidence of other consumers of that product, cannot represent the relevant product market"(emphasis in original)), *aff'd*, 13 F.3d 366, 368 (10th Cir. 1993) ("Other consumers must be accommodated in determining the relevant product market."); *Redmond v. Missouri Western State College*, No. 84-6139, 1988 WL 142119, *2 (W.D. Mo. Nov. 2, 1988) ("it seems unprecedented to allow a claim that a defendant has monopolized a class of customers as distinguished from a product or service").

Petitioners err in contending (Pet. 15-17) that the decision below and *T. Harris Young* are inconsistent with this Court's decision in *Kodak*. The market definition question addressed in *Kodak* — whether markets for service and parts can be distinct for antitrust purposes (*see* 504 U.S. at 462-63) — simply has nothing to do with the question presented here. Equally irrelevant is this Court's holding that lack of market power in an equipment market does not foreclose, as a matter of law, the possibility of market power in an aftermarket for parts. *See id.* at 465-77. As explained above, the decisions below and in *T. Harris Young* do not rest on a court's assessment of what makes "'economic sense,'" *id.* at 467 (citation omitted), but on the straightforward legal proposition that "identical" products, even if sold to different customers, must be reasonably "interchangeable." Pet. App. A10. Far from undercutting that proposition, *Kodak* confirms that the relevant market must include "'products that have reasonable interchangeability.'" 504 U.S. at 482, quoting *du Pont*, 351 U.S. at 404.

Petitioners also err in suggesting (Pet. 18-19, 21-22) that this Court has approved product markets defined solely by reference to customers. In every case cited by petitioners, the market was defined by reference to *product* characteristics, and by application of the standard criterion of reasonable interchangeability. *See, e.g., NCAA v. Board of Regents of*

Univ. of Okla., 468 U.S. 85, 95 (1984) (live college football television; "alternative programming has a significantly different and lesser audience appeal" (citation omitted)); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356-57 (1963) (commercial banking services sufficiently "distinctive" to constitute product market); *International Boxing Club*, 358 U.S. at 251 (championship boxing; "nonchampionship fights are not 'reasonably interchangeable for the same purpose' as championship contests" (quoting *du Pont*, 351 U.S. at 395)); *United States v. Paramount Pictures*, 334 U.S. 131, 172-73 (1948) (first-run feature films, which "constitut[e] the cream of the exhibition business").

3. Petitioners' final argument (Pet. 23-30) is that the courts below misapplied the seven "practical indicia" set forth in *Brown Shoe* to the facts of this case. For at least three different reasons, that contention warrants no further review. First, it is, on its face, highly factbound. Second, it repeatedly rests on the premise that, even though all restaurants purchase the same beverage *products*, locally-owned restaurants purchase beverage *services* that are typically more extensive than those purchased by regionally-owned and nationally-owned restaurants. That premise, however, is inconsistent even with petitioners' amended complaint, which contained "no allegation that the products *and services* provided to such restaurants differed from the products *and services* provided to locally owned restaurants." Pet. App. A2 (emphases added). This Court should not grant review to permit petitioners to change their factual allegations yet again. Finally, even assuming that this factbound argument had been properly preserved, it is meritless in any event. As the court of appeals explained, even this "total services" argument "does not explain why the submarket should be limited to taverns and locally owned restaurants," because "[t]here is no allegation that non-locally owned restaurants could not use all of the services provided by Multi-Flow." Pet. App. A10-A11. Nothing in that analysis, or

in the remainder of the court of appeals' straightforward unpublished affirmance, warrants any further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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